

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

| | | |
|---------------------------------------|---|----------------------------------|
| RULE AMENDMENTS TO 312 IAC 18, |) | Administrative Cause |
| GOVERNING ENTOMOLOGY AND |) | Number 11-133A |
| PLANT PATHOLOGY |) | |
| |) | (LSA Document #11-663(F)) |

**REPORT ON RULE PROCESSING, PUBLIC HEARING WRITTEN
COMMENT, HEARING OFFICER ANALYSES AND RECOMMENDATION**

1. RULE PROCESSING

For consideration is proposed amendments to 312 IAC 18, which establishes standards for operation and maintenance within an infested area declared under IC 14-24-4 and establishes quarantine standards necessary to carry out IC 14-24. The definition of “pest or pathogen” is amended at 312 IAC 18-1-13 to be consistent with the statutory definition. 312 IAC 18-2-2 is amended to allow the Director of the Department of Natural Resources to establish and modify boundaries of a quarantined area for a pest or pathogen. This amendment would align the rule with the IC 14-24-4-2. 312 IAC 18-3-22 is added to support the production of seedlings for reforestation and other purposes that are “apparently free from pests and pathogens”. IC 14-24-5-3(e). On August 27, 2009, the Commission’s Division of Hearings opened an administrative file to track the proposed amendments.

The Commission gave preliminary adoption to the rule amendments on May 17, 2011¹. As reported in the pertinent portions of the September 20 minutes:

Phillip Marshall, Indiana State Entomologist, presented this item. He explained that P.L. 17-2009 amended the definition of “pest or pathogen” resulting in a proposed amendment to the definition of “pest or pathogen” at 312 IAC 18-1-13 by adding fungus, parasitic plant, mollusk, and exotic weed. Another amendment at 312 IAC 18-2-2 would clarify the declaration of the boundaries of

¹ On September 22, 2009, the Commission gave preliminary adoption to a previous rule amendment governing the same subject matter. An excerpt of the September 22 meeting minutes is included on page five of this report.

infested areas and quarantines. “The prior rules restricted us to boundaries by township, and that is somewhat unworkable in many situations on a biological basis.” 312 IAC 18-3-22 would provide standards for production of pest and pathogen free nursery stock. The Commission considered a previous rule amendment proposal governing the same matter. He said the Commission’s recommendations have been incorporated into the new proposal. Marshall explained the three proposed rule amendments were combined for efficiency.

Donald Ruch asked for clarification of the use of the term “microorganism” in the definition of “pest or pathogen”.

Marshall said “microorganism” could also include a virus. “That was more of a broad spectrum term. We felt it was more appropriate to be more specific with microorganisms such as fungi or bacteria.” Marshall said the proposed amendment to the definition of “pest or pathogen” and the quarantine boundaries were recommended by the Invasive Species Task Force.

Ruch said, “So, in summary then, the term is meant to represent basically viruses and bacteria?” Marshall answered in the affirmative.

Doug Grant moved to give preliminary adoption of amendments to 312 IAC 18, governing entomology and plant pathology, to set standards for pest-and-pathogen-free nursery stock, as well as amendments to amend rule language to conform to 2009 statutory amendments. R. T. Green seconded the motion. Upon a voice vote, the motion carried.

The “Notice of Intent” to adopt a proposed rule amendment was posted to the INDIANA REGISTER at 20111207-IR-312110740NIA on December 7, 2011. The notice identified Phillip Marshall, State Entomologist, as the “small business regulatory coordinator” for purposes of Indiana Code § 4-22-2-28.1.

As specified by Executive Order, proposed fiscal analyses of the rule proposal were submitted, along with a copy of the proposed rule language and a copy of the posted Notice of Intent, to the Office of Management and Budget on December 9, 2011. In a letter dated January 12, 2012, Adam M. Horst, Director, Office of Management and Budget, recommended that the proposed rule amendments be approved.

The Division of Hearings submitted the rule proposal to the Legislative Services Agency, along with the “Statement Concerning Rules Affecting Small Business” (also known as the “Economic Impact Statement”), on January 17, 2012. The Notice of Public Hearing was submitted to the Legislative Services Agency on January 18, 2012. On February 1, 2012, the following were posted to the INDIANA REGISTER: the text of the proposed rule at 20120201-IR-312110740PRA; the notice of public hearing along with the justification statement (IC 4-22-2-24(d)(3)) at

20120201-IR-312110740PHA; and the Economic Impact Statement at 20120201-IR-312110740EIA. Following receipt of an “Authorization to Proceed” from the Legislative Services Agency on January 18, 2012, the Division of Hearings caused a Notice of Public Hearing to be published by the Indianapolis Newspapers in the Indianapolis *Daily Star*, a newspaper of general circulation in Marion County Indiana, on January 30, 2012. In addition, the notice of the public hearing and a summary of the proposed rule changes were published on the Commission’s web-based electronic calendar.

The Statement Concerning Rules Affecting Small Businesses (the “EIS”), as required under IC 4-22-2.1-5, and submitted by the Small Business Regulatory Coordinator, indicates

Estimated Average Annual Reporting, Record Keeping, and Other Administrative Costs Small Businesses Will Incur for Compliance:

Businesses subject to this rule currently have no annual reporting, record keeping, or administrative costs, and the change in this rule will not require any changes to the current method of conducting business.

Businesses subject to [312 IAC 18-2-2](#) may or may not have annual reporting, record keeping, or administrative costs. They only have annual reporting, record keeping, or administrative costs if they are currently in a quarantine area. The rule change will not alter the annual reporting, record keeping, or administrative costs. The rule change will not create or amend any current quarantine ([312 IAC 18-3-12](#); [312 IAC 18-3-14](#); [312 IAC 18-3-18](#); [312 IAC 18-3-20](#); [312 IAC 18-3-21](#)). Thus, change in this rule will not require any changes to the current method of conducting business.

Businesses currently subject to this rule are required to keep detailed records of fumigants, restricted use pesticides, and other chemicals being used on their property. These rules are enforced by the Office of the Indiana State Chemist. Adoption of this rule will not place any further impact on the businesses already conducting these measures.

Estimated Total Annual Economic Impact on Small Businesses to Comply:

There will be no economic impact on small businesses to comply with the proposed rules as the proposed rules do not require these businesses to change their current daily practices of conducting business.

Review by the Indiana Economic Development Corporation (the “IEDC”) was not required due to the resulting economic analysis.

2. PUBLIC HEARING AND WRITTEN COMMENTS

The public hearing was held as scheduled on March 6, 2012. Megan Abraham, Fumigation and Compliance Inspector with the Division of Entomology and Plant Pathology, attended the public hearing. No member of the public was in attendance.

One comment was received regarding the proposed rule amendments, and follows:

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| <p>Commentor Name Christopher A Carver Jr. Commentor County 26 Commentor State IN Commentor City owensville Commentor Organization Commentor Email Comment I concur with this, It is detrimental to prevent any more invasive species from spreading and to allow the area be reforested after pest are eliminated. Time stamp 07/07/2011 07:57:42 PM</p> |
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3. HEARING OFFICER ANALYSES AND RECOMMENDATION REGARDING FINAL ADOPTION

312 IAC 18-1-13 is amended to update the definition of “pest” or “pathogen” to include a broader spectrum of microorganisms, including viruses and fungi. The amendment to 312 IAC 8-2-2 allows the director to establish quarantine boundaries that facilitate public and industry compliance. Previously, if a pest or pathogen was present in an area, the statute required declaration of an “infested area” by township. Theoretically, a pest or pathogen could be adjacent to the township line, but not detected; therefore, the adjacent township could not statutorily be declared infested, which creates inflexibility. The definition is amended to change “township” to “area”. This change is more biologically sound for effective pest and pathogen management.

Effective July 1, 2009², P.L. 69-2009, SEC. 11 added IC 14-24-5-3(e) to comply with the U.S. Environmental Protection Agency’s requirement for the production of pest and pathogen free seedlings. Subsection (e) provides that

(e) The division shall communicate to nurserymen that methyl bromide soil fumigation is preferred to produce pest and disease free forest seedlings. Fumigation with methyl bromide of seedling beds before seeding is an official control treatment to assure pest free nursery stock.

² IC 4-22-2-19(c) states that “[a]n agency shall...begin the rulemaking process not later than sixty (60) days after the effective date of the statute that authorizes the rule”. On August 27, 2009, the Commission’s Division of Hearings opened Administrative file 09-146E to track proposed rule amendments.

An excerpt of the Commission's September 22, 2009 minutes follows.

Marshall explained that the third proposed amendment is to the rules governing nursery operations and fumigation as a recognized pre-plant treatment, primarily for bare root nurseries, to create pest and pathogen free products that are shipped within the state and outside of state boundaries. "To have this as a recognized method for us will allow us both for our normal operations of business plus also the quarantine requirements for trade between the states and even potentially if they were to go international.... It is a benefit to our state industry, our state nurseries, as well as our private nurseries".

Jane Ann Stautz questioned why methyl bromide is specified "when there may be alternatives". Marshall agreed there are alternatives, and these are "listed indirectly" in 312 IAC 18-3-22(b)(2)." Methyl bromide is the compound currently used "so the Division of Forestry, in consultation with [the Task Force], asked to have it stated..., but then I said we have to list all other methods of fumigation. We cannot limit it to just that method".

Stautz said, "Especially given the current regulatory status on methyl bromide, it may be wise to be a little broader on your options for treatment."

Marshall agreed and said that methyl bromide would be one of the methods for fumigation.

Stautz asked whether it would be "appropriate to amend 312 IAC 18-3-22(b)(1) to read 'pre-plant soil fumigation is the preferred method'."

Marshall indicated that the amendment would be appropriate.

Jane Ann Stautz moved to give preliminary adoption of the proposed rule with an amendment to 312 IAC 18-3-22(b)(1) to read "pre-plant soil fumigation is the preferred and control method" and striking phrase "methyl bromide". Patrick Early seconded the motion. Upon a voice vote, the motion carried.

The amendment would align the rule with the statutory requirement that soil fumigation is preferred to produce pest and disease free forest seedlings, and pre-plant soil fumigation is an official control treatment to assure pest free nursery stock used in reforestation, afforestation, or another natural resources purpose. The exclusion of a specific list of State Chemist approved chemicals, such as methyl bromide, in the proposed amendment provides industry flexibility.

The Indiana Invasive Council supports the proposed amendments. The one comment received also appears to be supportive. It is recommended that the amendments set forth in Exhibit A be given final adoption.

Dated: March 20, 2012

Jennifer M. Kane
Hearing Officer

TITLE 312 NATURAL RESOURCES COMMISSION

Final Rule
LSA Document #11-740(F)

DIGEST

Amends 312 IAC 18-1-13 to update the definition of "pest or pathogen" to be consistent with the statutory definition. Amends 312 IAC 18-2-2 to allow the director to establish and modify boundaries of a quarantined area for a pest or pathogen consistently with amendments made to IC 14-24-4-2. Adds 312 IAC 18-3-22 to produce seedlings, used in reforestation, afforestation, or another natural resources purpose, that are free of pests or pathogens. Effective 30 days after filing with the Publisher.

312 IAC 18-1-13; 312 IAC 18-2-2; 312 IAC 18-3-22

SECTION 1. 312 IAC 18-1-13 IS AMENDED TO READ AS FOLLOWS:

312 IAC 18-1-13 "Pest or pathogen" defined
Authority: IC 14-10-2-4; IC 14-24-3-1
Affected: IC 14-24

Sec. 13. "Pest or pathogen" means:

- (1) an arthropod;
- (2) a nematode;
- (3) a microorganism; ~~or~~
- (4) a fungus;
- (5) a parasitic plant;
- (6) a mollusk;
- (7) a plant disease; **or**
- (8) an exotic weed;

that may be injurious to nursery stock, agricultural crops, other vegetation, or bees. (*Natural Resources Commission; 312 IAC 18-1-13; filed Nov 22, 1996, 3:00 p.m.: 20 IR 941; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; readopted filed Sep 19, 2008, 10:23 a.m.: 20081008-IR-312080076RFA*)

SECTION 2. 312 IAC 18-2-2 IS AMENDED TO READ AS FOLLOWS:

312 IAC 18-2-2 Infested areas; quarantines
Authority: IC 14-10-2-4; IC 14-24-3-1
Affected: IC 14-24

Sec. 2. (a) The division may inspect any site in Indiana where agricultural, horticultural, or sylvan products are being grown, shipped, sold, or stored to determine if a pest or pathogen is present. If, as a result of an inspection, a site is determined to be infested with a pest or pathogen that is likely to spread or communicate to adjacent or contiguous territory in an adjoining ~~township, area~~, the director may ~~declare all or part of the township~~ **prescribe the boundaries of an area** where the pest or pathogen is located **and declare the area** to be an infested area.

(b) The division director shall formulate a quarantine under section 3 of this rule for an infested area declared under subsection (a). The quarantine may restrict or prohibit the transportation, maintenance, or continued existence of designated plants, plant products, elements of beekeeping, pests or pathogens, animal products, or other articles or materials known or

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reasonably believed to harbor or carry pests or pathogens. (*Natural Resources Commission; 312 IAC 18-2-2; filed Nov 22, 1996, 3:00 p.m.: 20 IR 942; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; readopted filed Sep 19, 2008, 10:23 a.m.: 20081008-IR-312080076RFA*)

SECTION 3. 312 IAC 18-3-22 IS ADDED TO READ AS FOLLOWS:

312 IAC 18-3-22 Production of pest and pathogen free nursery stock

Authority: IC 14-10-2-4; IC 14-24-3-1

Affected: IC 14-24-5-3

Sec. 22. (a) This section assists with the implementation of IC 14-24-5-3 for a nursery that produces forest seedlings to be replanted in Indiana or outside of Indiana for any of the following:

- (1) Reforestation.**
- (2) Afforestation.**
- (3) Another natural resources purpose.**

(b) Preplant soil fumigation of forest seedling nursery beds is an official control treatment to meet quarantine requirements and to assure pest and pathogen free forest seedlings, including underground portions of forest seedlings.

(c) Preplant soil fumigation is the preferred method to produce pest and pathogen free forest seedlings.

(d) A nursery must perform any preplant soil fumigation treatment using state and federally-registered pesticides that are applied according to pesticide label instructions.

(e) A nursery must not perform any preplant soil fumigation treatment that differs from the requirements of this section except upon prior approval by the state entomologist or a designate of the state entomologist. (*Natural Resources Commission; 312 IAC 18-3-22*)